IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2866 of 2003
with
SPECIAL CIVIL APPLICATION No 2867 & 2868 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CHETANKUMAR OMPRAKASH SHARMA

Versus

COMMISSIONER OF POLICE AHMEDABAD CITY

Appearance:

1. Special Civil Application No. 2866 of 2003
MR CHETAN B RAVAL for Petitioner No. 1
Mr. R.C. Kodekar, AGP for Respondent No. 1-3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 10/06/2003

ORAL JUDGEMENT

Heard learned advocate Ms. Banna Datta for the petitioners and Mr. R.C. Kodekar, learned AGP for the respondents.The petitioners in these three petitions were dangerous persons. The petitioners in these three petitions were arrested on 3.12.2002 by the concerned police authority in connection with the offence registered against them at Kagdapith Police Station at I CR No. 417 of 2002 for the offence under section 120(B), 143, 147, 148, 307 of the IP Code and Section 135(1) of the Bombay Police Act. The Sponsoring Authority forwarded proposal to the detaining authority on 9th December, 2002. Before that, on 5.12.2002, statements of the secret witnesses were recorded by the PI, Kagdapith Police Station and the two statements which were recorded by the Senior PI, Kagdapith Police Station were verified by the detaining authority on 10.12.2002 and thereafter, on the very next day i.e. on 11.12.2002, impugned order of detention was passed by the detaining authority under section 3(2) of the Gujarat Prevention of Anti Social Activities Act, 1985 ("the PASA Act" for short) against the present petitioners and the detenu Chetankumar Omprakash Sharma who is the petitioner in Special Civil Application No. 2866 of 2003, was ordered to be detained at Bhavnagar Jail; the detenu Manojkumar Bholanath Shukla who is the petitioner in special civil application no. 2867 of 2003, was ordered to be detained at Nadiad Jail and the detenu Shri Premsing alias Pappu Ranjitsinh Rajput who is the petitioner in special civil application no. 2868 of 2003 was ordered to be detained at Vadodara Jail.The impugned order of detention was executed against the present petitioners on the same day. The petitioners have challenged the said order of detention dated 11.12.2002 in these three petitions.

These petitions were admitted by issuing rule thereon by order dated 17.3.2003. Affidavit in reply have been filed in these petitions and the copies thereof were served upon the petitioners.

The petitioners have challenged the impugned order of detention on various grounds but during the course of hearing, learned advocate Ms. Banna Datta has submitted that when the impugned order of detention was passed against the present petitioners, the petitioners were in judicial custody and the detaining authority has not taken into consideration the likelihood of the petitioners' release on bail and, therefore, it amounts to non application of mind. She also contended that looking to the statements obtained by the PI of Kagdapith, it appears that the same were obtained by the said PI on 5.12.2002 and were thereafter verified by the

detaining authority on 10.12.2002 and on the very next day, impugned order of detention was passed by the detaining authority. She has relied on the decision of this Court in case of RANUBHAI BHIKHABHAI BHARWAD (VEKARIA) VERSUS STATE OF GUJARAT reported in 2000(3) GLR page 2696. As regards the first contention that the petitioners were in judicial custody at the time when the impugned order of detention was passed, she has placed reliance on the decision of this court in special civil application no. 1829 of 2001 dated 1st May, 2001, in case of Zakirhusain Iqbalhusein Shaikh versus Commissioner of Police. She has also relied on the decision in case of Amratlal v. Secretary, Ministry of Finance and others reported in AIR 2000 SC 3675.

Learned AGP Mr. Kodekar appearing for the respondents has opposed the present petitions. It was his submission that the impugned order of detention has rightly been passed by the detaining authority after recording subjective satisfaction. He has also submitted that the detaining authority has considered all the material which was relevant and has applied his mind in respect of all the material and thereafter has passed the impugned order of detention. For opposing the contention of Ms. Datta about the judicial custody, learned AGP Mr. Kodekar has relied on the decision of the apex court in case of MEENA JAYENDRA THAKUR V/s. Union of India and Others reported in (1999) 8 SCC 177 and has submitted that even then the detaining authority is entitled to pass the order of detention. He has also submitted that looking to the facts of the present case, when the detenu petitioners were in judicial custody, the detaining authority was right in passing the impugned order of detention appreciating the fact that there are likelihood of their preferring bail applications and in case if the bail is granted, similar activities will be carried out by the petitioners which will be dangerous to the society and would disturb the peace in the society and, therefore, the detaining authority has rightly applied his mind to the facts of the case and has also gave reasons in support of the detention order and the detention order is not vitiated on any ground. He has also relied on the affidavit in reply which was filed by the Commissioner of Police and has submitted that the detaining authority has considered all the relevant material with regard to the judicial custody of the detenu in these petitions at the time of passing of the order of detention and has arrived at the right conclusion that after the expiry of the remand period, if the detenu is produced before the court concerned, he may move necessary application for bail and if he is released

on bail, there is likelihood of his being released on bail and thereafter, he may continue his anti social activities which may prejudicially affect the maintenance of public order. and, therefore, the impugned order of detention is not required to be set aside on any ground.

As against that, it was submitted by the learned advocate Ms. Datta that in para 6 of the memo of petition, specific contention was raised by the petitioner that the statements of the two witnesses were recorded on 5.12.2002 and 7.12.2002 which were verified by the respondent authority on 10.12.2002 and the order of detention is passed on the very next day i.e. on 11.12.2002 and, therefore, it amounts to non application of mind. This contention raised by the petitioner has been replied by the detaining authority in his affidavit in reply to the petition. In para 5 of the affidavit in reply, while dealing with the contentions raised by the petitioner in para 1 to 6 and 12 of the petition, the deponent has submitted on receipt of the proposal alongwith the materials from the sponsoring authority for detention of the detenu, he has carefully scrutinized, examined and considered all those material and personally verified the genuineness, correctness and veracity of the incidents narrated in the statements of witnesses in the unregistered cases by calling the said witnesses to his office and found the said facts to be genuine and believable and thereafter, on the basis of the said material, he formulated the grounds of detention which are true, correct, clear and proper and the detenu has rightly been detained as a dangerous person as defined under sec. 2(c) of the PASA Act. The deponent has, therefore, submitted that after subjectively satisfying himself that the detenu is a head strong and dangerous person and his anti social and criminal activities are directly or indirectly causing and are likely to cause harm, danger and alarm of insecurity among the general public or section thereof and he is, thus, disturbing the public order and public peace and there is also grave or wide spread danger to life and property and, therefore, he has been detained under the PASA Act with a view to preventing him from continuing his anti social and criminal activities in any manner prejudicial to the maintenance of public order after satisfying that such activities of the detenu cannot be curbed or prevented immediately by resorting to action under the ordinary law as a preventive measure. Except the submissions on this line, no other submissions were made by the learned AGP Mr. Kodekar for the respondents.

I have considered the submissions made by the

learned advocates for the parties. I have also perused the record which has been placed before this Court. From perusal of the record and the grounds of detention in particular, it is not in dispute that at the time when the impugned order of detention was passed, all the petitioners herein were in judicial custody. From the record, it is not becoming clear that any bail application was filed by the petitioners at the time when the impugned order of detention was passed by the detaining authority. It is also not clear from the record as to on which date, remand has been over but the detaining authority has observed in respect of the judicial custody of the petitioners that the petitioners can apply for bail before the competent court at any time and in case, if the bail is granted, then, the petitioners may indulge in the same anti social criminal activities and disturb the public peace and public order. The possibility of filing an application for bail by the petitioners has been rightly appreciated by the detaining authority that after the period of remand is over, the petitioners may approach the competent court for bail. Thus, the possibility of filing an application for bail by the petitioner has been appreciated by the detaining authority but the subsequent aspect namely possibility of grant of bail has not been examined by the detaining authority as to whether the petitioners are likely to be released on bail if they prefers an application for bail. Thus, before passing the impugned order of detention, the detaining authority ought to have taken into account the possibility of grant of bail in favour of the petitioners in the event of their preferring an application for bail. Consideration of the possibility of an application for bail and the consideration of the possibility of grant of bail in the event of preferring such an application for bail both are different and distinct aspects required to be taken into consideration by the detaining authority before passing an order of detention. In Special Civil Application No. 1829 of 2001 in case of Zakirhusain Iqbalhusein Shaikh versus Commissioner of Police, decided by this Court on 1st May, 2001, this Court has examined this question after considering the decision in case of Ramesh Yadav Versus District Magistrate, Ita and others reported in 1985 (4) SCC 232 and has set aside the order of detention. In case of Ramesh Yadav Versus District Magistrate, Ita and others reported in 1985 (4) SCC 232, the Hon'ble Apex Court has taken the view that if the apprehension of the detaining authority was true, the bail application had to be opposed and in all case, bail was granted, challenge against that order in the higher forum had to be raised. It has also been observed by the apex court in the said decision that merely on the ground

that an accused in detention as an under trial prisoner was likely to get bail, an order of detention under the National Security Act would not ordinarily be passed. After making such observation, the Hon'ble Apex Court has further observed that the order of detention in the circumstances is not sustainable and is contrary to the well settled principles and has ultimately quashed and set aside the order of detention.

Ms. Banna Datta, learned advocate for the petitioners has also relied on the decision in case of Amrutlal and others versus Union of India reported in 2000(1) SCC 341= AIR 2000 SC 3675. In case of Amratlal and others versus Union of India reported in AIR 2000 SC 3675, it has been observed by the Hon'ble Apex Court that while passing the order of detention, subjective satisfaction of the detaining authority is required to be established from the record. If the detenu is already in jail, then, the detaining authority must be satisfied on the basis of the available cogent material about likelihood of the detenu being released on bail and not merely about likelihood of his moving an application for bail. In absence of such subjective satisfaction, order of detention cannot sustain.

As against that, learned AGP Mr. Kodekar has placed reliance on the decision of the Hon'ble apex court in case of Meena J. Thakor (supra), head note - C in particular. It was a matter under the COFEPOSA Act, 1973. In the said decision, the detenu was already in jail. It has been held that the detaining authority has applied its mind by considering all the relevant material and decided and directed to get the order executed. It was also held that the detention of the detenu and the detention order not vitiated. In the said decision, observations have been made in para 15. Para 14 of the said decision is also relevant wherein the Hon'ble apex court has considered the decision in case of Binod Singh v. District Magistrate, Dhanbad reported in (1986) 4 SCC 416 : 1986 SCC (Cri) 490. In para 15 of the said decision, the Hon'ble Apex Court has observed that it has been indicated that not only the fact that the detenu is in custody on being arrested on being arrested in some other case was brought to the notice of the detaining authority, but also the detaining authority on consideration of all relevant material including the fact that there may be a possibility of the detenu being released on bail, thought it fit to get the order of detention served on the detenu. These are the important observations made by the Hon'ble apex court, applicable to the facts of the present case. In the case cited by

the learned AGP Mr. Kodekar, the detaining authority has considered the fact that 'there may be a possibility of the detenu being released on bail' and after considering such possibility of the detenu being released on bail, the detaining authority therein thought it fit to get the order of detention served on the detenu. If the facts of the case before hand are considered, the detaining authority has considered the possibility of preferring an application for bail by the petitioners but the consequence of such an application for bail namely possibility of grant thereof in favour of the petitioners has not been considered by the detaining authority before passing the impugned order of detention. Relevant observations made by the Hon'ble apex court in para 14 and 15 of the said decision are reproduced as under:

"14. In support of the third contention, Mr. Kotwal relies upon the decision of this Court in Binod Singh v. District Magistrate, Dhanbad [(1986) 4 SCC 416 : 1986 SCC (Cri) 490]. In the aforesaid case, this Court has observed : (SCC pp.420-21, para 7)

'If a man is in custody and there is no imminent possibility of his being released, the power of preventing detention should not be exercised. in the instant case, when the actual order of detention was served upon the detenu, the detenu was in jail. There is no indication that this factor or the question that the said detenu might e released or that there was such a possibility of his release was taken into consideration by the detaining authority properly and seriously before the service of the order.'

15. It is this observation which Mr. Kotwal heavily relies upon. But as has been stated earlier in the affidavit filed, it has been indicated that not only the fact that the detenu is in custody on being arrested on being arrested in some other case was brought to the notice of the detaining authority, but also the detaining authority on consideration of all relevant material including the fact that there may be a possibility of the detenu being released on bail, thought it fit to get the order of detention served on the detenu. In the premises, the ratio in the aforesaid case will have no application.

This is not a case where the detaining authority has not applied his mind to the relevant material, but a case where the detaining authority considered all the relevant material and decided and directed to get the order executed. Consequently, we do not find any merit in the aforesaid two contentions."

Considering the ratio of the aforesaid decision of the Hon'ble Apex Court in light of the facts of the present case, looking to the reasons given by the detaining authority, in the facts of the present case, no doubt, the detaining authority has rightly considered that after the period of remand is over, the detenu may approach the competent court for bail at any time but the detaining authority has not applied the mind in respect of the fact that after the filing of the bail application before the competent court, whether there is any possibility of the detenu of being released on bail or not. If the facts of the present case are considered as a whole, it would become clear that that aspect has not at all been considered by the detaining authority in the order of detention. What has been considered by the detaining authority is the possibility of the detenu preferring an application for bail after the completion of the period of remand and then the possibility of his indulging in the same anti social activities in the society adversely affecting the maintenance of law and order in the society. The possibility of preferring an application for bail and the possibility of the detenu being released on bail in such an application both are different and distinct aspects but the second aspect has not been considered by the detaining authority which has been considered by the detaining authority in the case of Meena J. Thakore (supra).In the decision of the apex court reported in AIR 2000 page 3675, the apex court has observed as under in para 4 of the decision.

"Reasoning available is the likelihood of his moving an application for bail which is different from the likelihood to be released on bail. This reasoning, in our view, is not sufficient compliance with the requirement as laid down."

The observations made by the apex court in the said decision are applicable to the facts of the present case. The observations made by the detaining authority in the aforesaid case before the apex court which have been reproduced above are similar to the observations made by the detaining authority in this case. Therefore, possibility or the likelihood of the detenu preferring an

application for bail after completion of the period of remand is required to be examined by the detaining authority and after examining that aspect, the detaining authority is required to examine as to whether there is any possibility or likelihood of his being released on bail in the event of his preferring an application for bail. In the instant case, the detaining authority has, no doubt, examined the first aspect namely possibility of the detenu preferring an application for bail in connection with the offence registered against him but then, the second aspect namely possibility of his being released on bail has not been examined by the detaining authority before passing the impugned order of detention and it shows non application of mind on the part of the detaining authority and, therefore, on that ground, the impugned order of detention is required to be quashed and set aside.

The contention that the statements of the secret witnesses were verified by the detaining authority on 10.12.2002 and on the next day, the impugned order of detention was passed by the detaining authority and, therefore, it shows non application of mind on the part of the detaining authority has been examined by this court in case of Ranubhai Bhikhabhai Bharwad (Vekaria) versus State of Gujarat reported in 2000(3) GLR page 2696. This Court has relied on the decision of the Division Bench of this Court in case of Kalidas C. Kahar v. State of Gujarat, 1993 (2) GLR 1659 and has thereafter observed that the manner in which the verification has been recorded of the statements made by these three witnesses for the purpose of sec. 9(2) shows that the same has been done only as an empty formality inasmuch as the same witnesses had been called before the detaining authority and the detaining authority had recorded that whatever the statements made by the witnesses were correct. Thus, the whole exercise appears to have been done as a mechanical exercise and it is not borne out that there is an active participation of mind on this aspect of the matter by the detaining authority for the purpose of verification of the facts as had been disclosed by the witnesses so as to express the fear and to invoke the privilege under section 9(2) against the disclosure of the names and addresses of the witnesses and it thus appears on the basis of the ratio of the decision of the Division Bench that it is a case of wrong exercise of power under section (2) and it is established that in such cases, the wrong exercise of power under section 9(2) adversely affects the detenu's right of making an effective representation guaranteed under Art. 22(5) of the Constitution of India. Relevant discussion

has been made in para 9 of the said judgment.

According to the learned AGP Mr. R.C. Kodekar, the detaining authority is not required to take into consideration the availability of lesser drastic remedy while forming the subjective satisfaction before passing the impugned order of detention. In support of the said contention, he has placed reliance on the decision of the Full Bench of this Court in case of Koli Bharatbhai Ukabhai Vegad versus District Magistrate reported in 2001(2) GLR page 1587.In the said matter, Full Bench of this Court has considered the aspect of cancellation of bail granted in favour of the detenu. While considering the question as to whether the detaining authority should consider the question of getting the bail cancelled as an alternative to preventive detention, the answer given was in the negative. In the instant case, at the time when the impugned order of detention was passed, the detenu was in judicial custody. The detaining authority has considered the aspect of their preferring an application for bail before the competent court but the subsequent aspect namely possibility of release of the detenu on bail has not been considered by the detaining authority. That was not the question for consideration before the Full Bench. The questions referred to the larger Bench of this Court as mentioned in para 4 of the said decision are reproduced as under:

"4. The gist of the constitution of this Larger Bench is an order under reference, of learned single Judge of this Court, dated 14.12.2000 (Coram : Kundan Singh, J.) as in the course of hearing of this petition, he found that divergent views are taken in three Division Bench Cases and one Single Bench Case. He, therefore, desired following questions to be considered and determined by the Larger Bench :

'(1) Which of the decisions taken by the Division Benches in the cases of Nasimbanu M. Shaikh v. Commissioner of Police reported in 1988 (2) GLH 475 or in the case of Zubedabibi Rasid Khan Pathan v. State of Gujarat, reported in 1995 (2) GLR 1134 and/or in the case of Unusbhai Hasanbhai v. District Magistrate in LPA NO. 1056 of 1999 decided on 15.9.1999 and/or in the case of Sagar Shrikrishna Ahir v. Police Commissioner, Ahmedabad is correct one ?

(2) Whether it is necessary for detaining authority before resorting preventive detention to take steps for cancellation of bail under section 437(2) of the Criminal Procedure Code, in the cases in which the detenu has, already, been granted bail ?

(3) Where the detaining authority has taken into consideration that the cancellation of bail under section 437(5) of Criminal Procedure Code would take long process and not resorting to take action for cancellation of bail under section 437(5) of Criminal Procedure Code in the registered cases in order to prevent anti social activities of the detenu, action for preventive detention is required. Even then will the satisfaction of the detaining authority be deemed to be impaired if any action for preventive indulging in anti social activities ?"

In light of the facts of the present case, I have considered these questions which were for consideration before the Larger Bench of this Court in the aforesaid matter.None of these questions is relating to the facts that at the time when the impugned order of detention was passed, the detenu were in judicial custody and at that time, the detaining authority was required to take into consideration two aspects namely possibility of the detenu preferring an application for bail and then, possibility of his release on bail by the competent court in connection with the offences registered against him. These questions were not for consideration before the Larger Bench of this Court and, therefore, in the facts of the present case, the decision of the Full Bench of this Court is not applicable.

In view of the above observations and considering the fact that the petitioners detenu were in judicial custody at the time when the impugned order of detention was passed against the petitioners, it is clear that the detaining authority has not applied his mind and has not considered the possibility of release of the detenu on bail in the event of their preferring an application for bail before the concerned court. Learned AGP Mr. Kodekar has not been able to point out that this aspect has been examined by the detaining authority and from the grounds of detention and the reasoning, it is very much

clear that this aspect has not been dealt with by the detaining authority. On 10th December, 2002, statements of the secret witnesses were verified by the detaining authority and on the very next day, impugned order of detention has been passed. This aspect has been examined by this court in the matter of Ranubhai Bhikhabhai Bharwad (Vekaria) versus State of Gujarat reported in 2000(3) GLR page 2696. Therefore, considering the facts and circumstances of the case and the reasoning given by the detaining authority, according to my opinion, impugned order of detention is required to be quashed and set aside.

For the reasons recorded hereinabove, the petitions succeed and the same are allowed. The impugned order of detention dated 11th December, 2002 is hereby quashed and set aside. The detenu Chetankumar Omprakash Sharma who is the petitioner in Special Civil Application No. 2866 of 2003, detained at Bhavnagar Jail; the detenu Manojkumar Bholanath Shukla who is the petitioner in special civil application no. 2867 of 2003, detained at Nadiad Jail and the detenu Shri Premsing alias Pappu Ranjitsinh Rajput who is the petitioner in special civil application no. 2868 of 2003 detained at Vadodara Jail be set at liberty if they are not required in any other case. Rule is made absolute accordingly with no order as to costs. Direct Service is Permitted.

Dt.10.6.2003 (H.K. Rathod,J.)

Vyas